

VERMONT TRANSPORTATION BOARD MEETING OCTOBER 7, 2019

Board Members Present:

David Coen, term expires 2/28/21
Pam Loranger, term expires 2/28/22
Wendy Harrison, term expires 2/28/22 (by phone)
Philip Zalinger, term expires 2/28/22
James Fitzgerald, Term expires 2/28/21
Richard Bailey, term expires 2/28/21

Board Members Absent:

Tim Hayward, term expires 2/28/2020

Others Present:

Ron Shems, Board Attorney
Jenny Ronnis, Vermont Assistant Attorney General
Megan Gregory, VTrans Legal Assistant
Sandy Mead, Claimant (by phone)

Call to Order:

Chair David Coen called the Monday, October 7, 2019 meeting to order at 9:35 a.m., which was held at Dewey Conference Room R235 at 1 National life Drive in Montpelier, VT.

1. NEW BUSINESS

1.1 TB-493 Mead Small Claim, hearing

Mr. Zicconi swore in the parties. Mr. Coen asked Ms. Mead to begin, telling her if there was something she would like to say to augment the paperwork associated with her case that now is the time.

Ms. Mead testified that VTrans in its paperwork acknowledges that this section of Route 15 in Colchester was problematic and tended to get worse during inclement weather. As a result, VTrans should have either erected warning signs or placed a cone along the roadway – something that would have warned motorists to expect a problem. This was a very deep pothole. After she hit the hole and damaged her tires, she noticed that there also were several other vehicles pulled over with similar problems. Since VTrans knew this pothole existed, had patched it several times and was continually problematic -- especially during rainstorms – the Agency should have done more to alert motorists to be careful while driving along this roadway segment.

Ms. Ronnis testified that VTrans was aware of the pothole and was checking it twice per day to ensure it was patched. On the day of Ms. Mead's accident (Saturday, February 16, 2019) the hole was checked at 3:30 p.m. and was patched, but it opened up sometime afterwards. The Agency received a call that the hole had opened at about 7:30 p.m., which was just prior to Ms. Mead's incident at about 7:45 p.m.. The Agency responded quickly and had the hole patched approximately an hour after it received notice, Ms. Ronnis said.

Ms. Mead testified that it was raining when she hit the pothole and it was dark. She said there were four cars pulled over with flat tires at the same time she was, and that when she called the police she was told that she was the seventh person to report a similar incident that evening and that the hole had been causing problems for about three weeks.

Mr. Fitzgerald said the paperwork makes clear that VTrans had ample notice that there was a problematic pothole in this location. Today's testimony shows she is one seven people who had problems on this specific day as well as had notice of problems during previous days. Thus it seems that VTrans had ample notice as the Agency had been notified at least three weeks prior to the date of Ms. Mead's accident.

Ms. Ronnis testified that the two critical elements involving negligence are notice and time to repair. The State of Vermont was aware this was a problem area, but road crews were checking it twice a day. Asphalt plants are not open during the winter, so it was not possible to make a more permanent repair until spring. As a result, road crews were filling the hole with cold patch. Since the area was checked at 3:30 p.m., the duration that the pothole could have been open was about five hours, which represents sometime between 3:30 p.m. when the area was last checked and 8:30 p.m. when the hole was patched by road crews. Given that VTrans received its first notice of the hole at 7:30 p.m. and patched it at 8:30 p.m., only an hour elapsed between notice and making the repair. Traditionally under case law, 72 hours is considered a reasonable time frame to make repairs. So whether you use the one hour timeframe from the point of notice or the 3:30 p.m. time of the last check, which is five hours before repair, the Agency responded within a reasonable timeframe, Ms. Ronnis said.

Mr. Fitzgerald said technically that VTrans had a much longer period of notice as it was notified three weeks prior to Ms. Meads incident and in between then and the time of Ms. Mead's accident the Agency did not make an effort to repair the area properly. It does not appear that a good, professional job to make repairs was made, he said.

Ms. Ronnis said a permanent repair could not have been made during this time, so as a precaution VTrans was checking the area twice per day. She said given that the asphalt plants were closed for the winter, there was nothing else VTrans could have done at the time.

Mr. Fitzgerald said there are other methods available besides cold patch to temporarily repair potholes. He said it was his opinion that VTrans did not do a very good job of repairing the hole or it would not have washed out in a rainstorm.

Mr. Zalinger asked Ms. Mead, who suggested that something other to or in addition to cold patch should have been used, including erecting a sign or a traffic cone, why she thought inspecting the hole at 3:30 p.m. to ensure the hole was still patched was not enough of a safeguard.

Ms. Mead said District 5 Transportation Foreman Shawn Lafountain in an affidavit filed by VTrans states that cold patch does not stick in cold weather and washes out when it rains or there is heavy

traffic. It was raining all day so something else should have been done. She said VTrans puts signs out when there is a bump in the road. This was a two-foot deep pothole that blew out her tire instantly, so something other than just cold patch should have been done, especially when VTrans knew the patch washes out in the rain and it was dark and hard to see. A sign, she said, would have gone a long way to warning motorists to slow down and use caution, especially when you consider that this was not the first day when tires had gotten blown out by hitting this particular pothole. VTrans knew the cold patch would not hold in the rain, so why was there not another course of action taken?

Mr. Zalinger said he was not sure that Ms. Mead's suggested course of action – erecting signs or cones – is a practical, workable solution statewide for VTrans to adopt for potholes. Ms. Mead agreed these were not practical solutions for every pothole statewide. But in an area where the Agency had been receiving complaints for as long as three weeks and that had a history of damaging vehicles, something other than simple patching, which the Agency now would not be sufficient, should have been done.

Ms. Harrison asked how close to the edge of the road was the pothole? Ms. Mead said the hole was not in the middle of the road and that it was her right tire that was damaged, so the hole was in the section of the roadway where a vehicle's tires usually travel. Ms. Harrison then asked VTrans, which sometimes does erect signs along problematic roadway sections, why there was no warning sign placed in this location.

Ms. Ronnis said there was no sign placed here because the roadway was being checked twice per day. If the area needed cold patch it was placed. Also, the Manual on Uniform Traffic Control Devices recommends that signs be used sparingly and only for "permanent" conditions because motorists can get "sign fatigue" and pay less attention to critical signs if overall there are too many signs placed along the roadways. As a result, VTrans policy is to be very measured in how it places signs under this kind of circumstance. Generally, the policy is to effect repair rather than place a sign, she said.

Ms. Harrison asked if VTrans received other monetary claims for this pothole. Ms. Ronnis said she checked and the Agency did not receive other claims related to this pothole.

Mr. Coen closed the hearing at 10:20 a.m. At 11:50 a.m., the Board on a motion by Mr. Fitzgerald, seconded by Mr. Zalinger and approved unanimously entered into deliberative session, pursuant to Title 1 § 313, to discuss TB-493 small claim of Sandy Mead.

Mr. Zicconi was invited to join the deliberative session.

The Board exited deliberative session at 12:14 p.m.

1.2 Review/Approve Minutes of June 24, 2019 Board meeting.

On a motion by Mr. Bailey seconded by Ms. Harrison, the Board unanimously voted to approve the minutes of the May 16, 2019 Board meeting with corrections.

1.3 TB-443 Schultz Contractor Claim – Attorney Fee Request to dismiss

On a motion by Mr. Fitzgerald seconded by Ms. Loranger, the Board unanimously voted to dismiss M.W. Schultz’s Supplemental Application for Fees and Expenses as the parties reached a settlement agreement.

1.4 RLA Working Group/Aviation Rules

Mr. Zicconi and Ms. Harrison informed the Board that they recently met with VTrans Aviation head Dan Delabruere and VTrans Policy Director Michele Boomhower to discuss the Board’s concerns that many Restricted Landing Areas are permitted by the Board with no municipal process due to the municipalities having no local regulations that pertain to helipads or airstrips. Over the winter, the Board proposed changes to 9 V.S.A. Section 207 to provide the Board land-use authority in cases when the municipality has no zoning or other local regulations that pertain to RLAs. The Agency rejected that idea, and this meeting was an attempt to reach consensus on a way to ensure local land-use issues are better addressed prior to an RLA application being made to the Board.

At the meeting with Mr. Delabruere and Ms. Boomhower, an agreement was reached that the Board would form an RLA working group that would draft model zoning regulations for RLAs that could be present to local municipalities for possible adoption. Everyone agreed that the working group would be comprised of representatives from the Vermont League of Cities and Towns (VLCT), the Vermont Planners Association, the Vermont Regional Planning Commissions, VTrans and the Board.

Mr. Zicconi informed the Board that following the meeting he attended the Vermont Planners Association’s Annual Meeting as well as a regular monthly meeting of the Vermont Association of Planning and Development Agencies to recruit both municipal and regional planners to participate on the working group. As result, two RPC officials, four municipal planners and one planning consultant volunteered. VLCT also agreed to participate.

The Board approved of the working group, and agreed that it should contain the two RPC officials (Jason Rasmussen from the Southern Windsor County RPC and Chris Campany from Windham Regional Commission) and the four municipal planners, which include Tom Jackman from Stowe, Michael Miller from Montpelier, Dalila Hall from South Burlington and Rod Francis of Norwich. Karen Horn will represent VLCT, while Mr. Delabruere and Joe Segale will represent VTrans. The Board appointed Ms. Harrison to Chair the Committee, which will be staffed by Mr. Zicconi and Board Attorney Ron Shems.

Mr. Zicconi said he would reach out to all RLA working group members to schedule the group’s first meeting, which hopefully will be held in either late October or early November.

The Board also agreed that it would wait to see the results of the working group before it revisited the Board's Aviation Rules and whether they could benefit from changes.

1.5 Don Weston v VTrans

At 10:25 a.m. the Board on a motion by Mr. Bailey, seconded by Ms. Loranger and approved unanimously entered into deliberative session, pursuant to Title 1 § 313, to discuss Don Weston Inc. v VTrans and the implications the litigation may have on the Board.

Mr. Zicconi and Mr. Shems were invited to join the deliberative session.

The Board exited deliberative session at 10:50 a.m.

1.6 Fall Meeting with Secretary Flynn

Mr. Coen reminded the Board that Secretary Flynn, when he met with Mr. Coen, Mr. Bailey and Mr. Zicconi in the spring, suggested that he and Board representatives meet again in six months or so to discuss issues the Board and VTrans wish to address. Mr. Coen asked Board members what topics they thought may be relevant at this time. The Board agreed that revamping the transportation small claims process, the RLA Working Group, and future public outreach efforts were timely topics for discussion. Mr. Coen said he also would like to thank the Secretary for his involvement as the issues that were discussed in the spring appear to have been addressed.

1.7 TB-490 Schneider Small Claim – Dismissal

Mr. Zicconi informed the Board that Chip Schneider has failed to return all calls and written communication regarding his small claim since May. He requested that the Board dismiss the claim.

On a motion by Mr. Fitzgerald seconded by Mr. Zalinger, the Board unanimously voted to dismiss TB-390 Small Claim of Chip Schneider with prejudice.

1.8 Executive Secretary's Report

Rye seed spraying via helicopter: Mr. Zicconi informed the Board that he was contacted by an organization that conducts rye seed spraying via helicopter for farmers in and around Addison County. The organization inquired about whether it needed a permit to conduct its operations. Mr. Zicconi said he researched the rye-spraying process, which occurs in the fall during some years while in other years does not occur at all. The helicopter during years of operation does not takeoff or land from the same location as the base of operation is constantly moved to be close to where spraying occurs. Mr. Zicconi said he contacted the Federal Aviation Administration, who advised such operations do not require federal permits due to how infrequently the flights occur and the fact that often the helicopters do not even land as rye seed is loaded into a sprayer that is lowered from the helicopter as it hovers above the ground. Mr. Zicconi also consulted with VTrans regarding the operation. Mr. Zicconi said he determined

that given the infrequency of operations and that no consistent ground location is used, that such flights do not require a state permit. The Board agreed, but also asked Mr. Zicconi to find out the origin of the helicopter used here in Vermont and where it is based in between spray events.

Following the meeting, Mr. Zicconi learned that the helicopter originates out of state and initially lands at the Middlebury State Airport, which is where it is housed when not spraying rye seed.

RLA Fee: Mr. Zicconi informed the Board that VTrans and the Governor's office has agreed to consider establishing a \$2,000 permit fee to establish an RLA. Such a fee would have to be approved by the Legislature. Mr. Zicconi said he is in the process of completing the paperwork associated with establishing such a fee and will submit it to VTrans once complete.

RLA Stowe Meeting: Mr. Zicconi informed the Board that in September he was invited to speak before the Stowe Planning Commission about RLAs and the state and local permit process as Stowe is interested in exploring local zoning regulations that specifically address private helipads and air strips.

1.9 Fall Meeting Schedule

The Board chose to next meet on November 13. It also narrowed possible January dates down to January 10, 15 or 16 and asked Mr. Zicconi to check with absent Board member Mr. Hayward and Mr. Shems (who had departed the meeting) to confirm which dates work for them and then pick one.

2. OLD BUSINESS

There was no old business.

3. OTHER BUSINESS

3.1 Round Table

No one had any issues to discuss

4. ADJOURN

On a motion by Mr. Hayward seconded by Mr. Zalinger, the Board unanimously voted to adjourn at 11:28 p.m.

Respectfully submitted,

John Zicconi
Executive Secretary